U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 July 2005

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In the Matter of:

CLIFFORD COLLETT,
Claimant,

v. **Case No. 2003-BLA-06373**

SHAMROCK COAL CO., INC.,
SELF-INSURED THRU:
SUN COAL COMPANY, INC.,
Employer/Carrier, and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest.

……..

Appearances:

John Hunt Morgan, Esq. on behalf of Edmund Collett, PSC, Hyden, KY
For Claimant

John Baird, Esq. Baird & Baird, PSC, Pikeville, KY
For Employer/Carrier

Before: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* (hereafter "the Act") filed by Claimant Clifford Collett ("Claimant") on February 21, 2001. The instant claim is the second claim filed by Claimant. The putative responsible operator is Shamrock Coal Company ("Employer").

Part 718 of title 20 of the Code of Federal Regulations is applicable to this claim, as it was filed after March 31, 1980, and the regulations amended as of December 20, 2000 are also

applicable, as this claim was filed after January 19, 2001.[1] 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.[2] The Department of Labor amended the regulations on December 15, 2003 for the purpose of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, including all evidence admitted and arguments submitted by the parties. Where pertinent, I have made credibility determinations concerning the evidence.

STATEMENT OF THE CASE

Claimant's first claim was filed on June 16, 1994, and Administrative Law Judge Donald W. Mosser issued a Decision and Order Denying Benefits on January 30, 1996, which was later affirmed by the Benefits Review Board ("Board"). *Collett v. Shamrock Coal Co.,* 96-0625 BLA (Sept. 27, 1996) (unpub). (DX1).

Claimant filed the instant claim on February 21, 2001. (DX 3). The District Director issued a September 28, 2001 Schedule for the Submission of Additional Evidence, which indicated that Claimant would not be entitled to benefits based on the initial evidence and that Shamrock Coal Company was the responsible operator. (DX 23). On a preliminary basis, the District Director's office concluded that the evidence indicated that Claimant worked as a coal miner for 13 years, that Claimant has pneumoconiosis, and that Claimant's pneumoconiosis was caused at least in part by exposure to coal mine dust. *Id.* However, the initial evidence did not support a finding that Claimant was totally disabled and the totally disabling impairment was caused at least in part by pneumoconiosis. *Id.* On June 24, 2002, the Proposed Decision and Order was issued by the District Director denying benefits because the evidence did not show that Claimant was totally disabled by the disease. (DX 27). Claimant requested a formal hearing. (DX 28). The case was initially transmitted for a hearing on September 27, 2002, but it was remanded by Administrative Law Judge Roketenetz on April 3, 2003 for the conduct of a medical examination by a physician of Employer's choice (even though the Claimant had already been examined by Dr. Broudy). (DX 32, 38). After the examination (by Dr. Dahhan) was conducted, the case was again transmitted to the Office of Administrative Law Judges on July 29, 2003 for a hearing. (DX 42).

A hearing in the above-captioned matter was held on April 28, 2004 in London, Kentucky. At the hearing, Director's Exhibit 1 through 42 ("DX 1" through "DX 42") were admitted into evidence. (Tr. at 5-6). Claimant's Exhibit 1 ("CX 1") and Employer's Exhibits 1 through 11 ("EX 1 through "EX 11") were also admitted. (Tr. at 31-34). Claimant was the only witness to testify. At the conclusion of the proceedings, the record was kept open for 60 days in order to allow Employer to take and submit the deposition of Dr. Dahhan (EX 12). (Tr. at 6). Both parties waived closing arguments and were given 30 days following the submission of Dr.

[1] Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

[2] Several sections were found to be impermissibly retroactive and one which attempted to effect an unauthorized cost shifting was not upheld by the court.

Dahhan's deposition to submit closing briefs. (Tr. at 36). Dr. Dahhan's deposition was transmitted under cover letter of May 25, 2005 and is now **ADMITTED** into evidence as EX 12. **SO ORDERED.** On July 26, 2004 Employer submitted a Motion for Extension of Time for an additional thirty days to file briefs, which was granted on August 4, 2004. Thereafter, on September 7, 2004 Employer submitted a closing brief, which is accepted as timely. No brief was submitted by Claimant.

On May 31, 2005 an Order to Show Cause was issued stating that the re-read of the June 13, 2001 x-ray was missing from the record and was stricken, absent its submission and a showing of good cause for its consideration. Additionally, the April 20, 2001 x-ray rereading of the February 24, 2001 (DX 13) and the November 19, 2001 rereading of the March 24, 2001 x-ray (DX 17) would be stricken from the record absent a showing of good cause inasmuch as they exceeded the evidentiary limitations. Also, Dr. Vuskovich's medical report (DX 36) was stricken in part, again absent a showing of good cause, and only the sections evaluating the blood gas studies and pulmonary function test would be considered. Employer and the other parties were given thirty (30) days to show cause why the stricken evidence should be admitted into evidence. Thereafter, Employer submitted a Response to Order to Show Cause on June 20, 2005, which stated that there was no objection to striking DX 13 and DX 17 and limiting DX 36 to the assessment of the pulmonary function and arterial blood gases.[3] In addition, Employer stated that the February 24, 2001 x-ray rereading was erroneously listed as both Employer's Exhibit 4 and 9, and Employer submitted the rereading of June 13, 2001 x-ray dated November 19, 2001 in correction of such error. That reading is appropriate rebuttal evidence and is listed as such as "EX 4" under Employer's BLBA Evidence Summary/Designation of Evidence form. Further, Employer stated that the evidence was previously submitted by facsimile to ALJ Roketenetz on March 18, 2003; there was no objection from Claimant concerning the submission of the x-ray reading. Therefore, the rereading of the June 13, 2001 x-ray dated November 19, 2001 by Dr. Hayes is designated as Employer's Exhibit Number 9 ("EX 9") and is **ADMITTED,** and any references to that exhibit as EX 4, including but not limited to its listing on Employer's designation of evidence form, are hereby corrected. **SO ORDERED.**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Issues/Stipulations

The issues before me are the existence of pneumoconiosis, its causal relationship with coal mine employment, total disability, causation of total disability, timeliness of the claim, and subsequent claims. (Tr. 8; 17-18, 20; DX 42). The Employer withdrew issue number 12, responsible operator and issue 18(a) as it relates to responsible operator, and issue number 13, insurance. (Tr. 7-8). At the hearing, the parties agreed that the issue of subsequent claims under 20 C.F.R. §725.309 was not listed due to an oversight (Tr. 17-18) and the list of issues is amended to include issue 14, Subsequent Claims. **SO ORDERED.** Additional issues were listed primarily for appellate purposes. (Tr. 7-8).

At the hearing, the parties stipulated to 14 years of coal mine employment. (Tr. 8). Based on the testimony and the review of the record, I accept the stipulation.

[3] This matter is addressed below under the section relating to Evidentiary Limitations.

Medical Evidence

The newly submitted medical evidence in this case is listed below. Interpretations of chest X-rays taken between February 2001 and May 2003, all of which utilize the ILO system and are in compliance with the regulatory standards, are summarized below.[4]

Exhibit No.	Date of X-ray/ Reading	Physician/ Qualifications	Interpretations
DX 12 (Claimant's Initial)	February 24, 2001 same	Glen R. Baker A-Reader[5]	Positive for pneumoconiosis; p/p; upper right/mid right and left zones; 1/0; quality (3).
EX 4[6] (Employer's Rebuttal)	February 24, 2001/ August 8, 2002	Thomas M. Hayes BCR & B-Reader	Completely Negative; quality (1).
DX 11 (DOL)	June 13, 2001 same	Imtiaz Hussain A-Reader[7]	Positive for pneumoconiosis; p/s; lower zones; 1/1; quality (1).
DX 11 (DOL)	June 13, 2001/ July 01, 2001	E.N. Sargent BCR & B-Reader	Quality only (2).
EX 9[8] (Employer's Rebuttal)	June 13, 2001/ November 19, 2001	Thomas M. Hayes BCR & B-Reader	Completely Negative; quality 2 (overexposed).
DX 14 (Employer's Initial)	July 2, 2001 same	Bruce Broudy B-Reader	Negative for pneumoconiosis; quality (1).
EX 7 (Employer's Initial)	May 30, 2003 same	A. Dahhan B- Reader	Negative for pneumoconiosis; quality (1).

[4] In addition, an x-ray dated 3/24/01 (read on 11/19/01) is listed in the Director's Exhibits, but will not be included inasmuch as it exceeds the evidentiary limitations. The evidentiary limitations are discussed below.

[5] Dr. Baker's B-reader certification ended on January 31, 2001 according to his curriculum vitae. (DX 12, CX 1). He was an A-Reader thereafter. See www.oalj.dol.gov (NIOSH Certified B-Reader List).

[6] Employer designated this x-ray reading as "EX 9" on its' evidence summary form and stated at the hearing that "Employer's Exhibit Number 9 was the medical report of Dr. Hayes, read x-ray of 2/24/01". (Tr. at 33). However, this x-ray actually appeared at "EX 4" in the Exhibit Binder. Thus, this x-ray is designated as "EX 4". As stated above, "EX 9" was later submitted by Employer.

[7] Dr. Hussain was a A-Reader from March 1, 2002 to present. His qualifications were found at www.oalj.dol.gov (NIOSH Certified B-Reader List).

[8] This exhibit was submitted by Employer in its Response to Order to Show Cause. Employer listed the rereading of the February 24, 2001 as both "EX 4" and "EX 9" on the Evidence Summary Form. Therefore, I will designate the 6/13/01 rereading as "EX 9," and the 2/24/01 rereading will be designated as "EX 4."

Pulmonary function tests taken on February 24, 2001 (DX 12) (Baker examination, Claimant's Initial); May 24, 2001 (DX 16) (Baker examination, Claimant's Initial); June 13, 2001 (DX 11) (DOL Examination); July 2, 2001 (EX 6) (Broudy Examination, Employer's Initial); and May 30, 2003 (EX 7) (Dahhan Examination, Employer's Initial) produced the following results:[9]

Exhibit No.	Date/ Physician	Age/Height	FEV1	FVC	MVV	FEV1/FVC
DX 12	2/24/01 G. Baker	55 67 inches	3.32 (pre)	4.36 (pre)	86 (pre)	76%
DX 11	6/13/01 I. Hussain	55 69 inches	3.12 (pre)	4.11 (pre)	62 (pre)	75.9 % (pre)
DX 16	5/24/01 G. Baker	55 67 inches	3.48 (pre)	4.61 (pre)	None	75% (pre)
DX 14, EX 6	7/02/01 B. Broudy	55 67 inches	3.45 (pre)	4.36 (pre)	98 (pre)	79 % (pre)
EX 7	5/30/03 A. Dahhan	57 67 inches	3.25 (pre)	4.03 (pre)	None	81% (pre)

Under subparagraph (i) of section 718.204(b)(2), total disability is established if the FEV1 value is equal to or less than the values set forth in the pertinent tables in 20 C.F.R. Part 718, Appendix B, for the miner's age, sex and height, if in addition, the tests reveal qualifying FVC or MVV values under the tables, or an FEV1/FVC ratio of less than 55%. None of the results are qualifying for total disability under the federal regulations.

Arterial blood gases were taken on February 24, 2001 (Baker examination, Claimant's Initial) (DX 12); June 13, 2001 (DOL examination) (DX 11); July 2, 2001 (Broudy examination, Employer's Initial) (EX 6); and May 30, 2003 (Dahhan examination, Employer's Initial) (EX 7). The ABGs produced the following values, none of which were qualifying under Part 718, Appendix C:

Exhibit No.	Date	Physician	pCO2	pO2	Qualifying?
DX 12	2/24/01[10]	G. Baker	38 (rest)	63 (rest)	No
DX 11	6/13/01	I. Hussain	38.2 (rest) 36.7 (exercise)	67 (rest) 77 (exercise)	No
EX 6	7/02/01	B. Broudy	38.7 (rest)	75.3 (rest)	No
EX 7	5/30/03	A. Dahhan	45.5 (rest) 42.8 (exercise)	66.5 (rest) 72.8 (exercise)	No

Medical opinions were rendered by four physicians. Specifically, opinions were issued by Dr. Glen Baker in connection with the February 24, 2001 examination of the Claimant (DX

[9] The assessments of the June 13, 2001 and February 24, 2001 pulmonary function tests are not included in this chart, but the assessments will be discussed in the total disability section of this decision.
[10] The results were listed on the medical report with no attached documentation.

12) (Claimant's Initial); by Dr. Imitiaz Hussain in connection with the June 13, 2001 DOL examination of Claimant (DX 11) (DOL Examination); by Dr. Bruce Boudy in connection withy the July 2, 2001 examination of Claimant (DX 14, EX 6) (Employer's Initial); and by Dr. Abdul Dahhan in connection with the May 30, 2003 examination of Claimant (EX 7) (Employer's Initial).

In addition, Claimant's treatment records were admitted into evidence. (DX 15; DX 16).

Background and Employment History

Claimant was the only witness to testify at the hearing and was a credible witness. He testified that he was divorced with one dependent son, who is a twenty-two year old college student. (Tr. at 9-10). He stated that he was unemployed and receives Social Security Disability Benefits. *Id.* at 10. He quit working for Shamrock due to a knee and foot injury. *Id.* at 21.

At the hearing, Claimant testified that he was employed with Shamrock Coal Company for fourteen years. (Tr. 11). Shamrock Coal was his only coal mine employer. *Id.*

Claimant stated that he was an underground worker who performed a variety of jobs, including section foreman, common laborer, and equipment operator. (Tr. 11) He was an equipment operator for a longer period during his employment. *Id.* As an equipment operator, he operated the scoop and shuttle car. *Id.* The scoop hauled supplies into the mines, cleaned the face up, cleaned roadways, "pull[ed] mantrips," and hauled workers in and out of the mines. *Id.* The shuttle car transported coal from the miner to the feeder, where the coal was dumped and loaded unto a belt. *Id.* at 11-12. During his entire employment, he worked at the face of mine, where the coal is cut and processed, which is dustier than the general mine. *Id.* at 12. The heaviest weight he was required to lift was one hundred pounds. *Id.* He described his work as heavy manual labor. *Id.* at 13.

Presently, he experiences coughing and spitting up phlegm. (Tr. 14). He identified Dr. Michelle Friday (family doctor), Dr. Baker (pulmonary doctor), and Dr. Truman Perry as his treating physicians. *Id.* at 15. He stated that he saw Dr. Baker every three months for re-fills of the Albuterol inhaler. *Id.* at 15-16. He testified that he began seeing Dr. Baker prior to filing this claim. *Id.* at 24. In addition, he testified that he had open heart surgery and is still recovering. *Id.* at 16.

There is conflicting evidence concerning the Claimant's smoking history. He testified at the hearing that he smoked five cigars a day for a period of four to five years. (Tr. at 28). However, the DOL medical report stated ten years of smoking history; the February 24, 2001 medical report stated two to four packs of cigars for ten to fifteen years; the July 2, 2001 medical report stated five cigars for ten years; and the May 30, 2003 medical report stated that Claimant was a non-smoker. I find that Claimant was not a cigarette smoker but a cigar smoker and ten years of cigar smoking is a reasonable estimate.

Discussion

Timeliness of Claim

Initially, I will address Employer's contention that this subsequent claim is untimely under §725.308 based upon the holding in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F. 3d 602 (6th Cir. 2001). Section 725.308 outlines the statute of limitation for filing for black lung benefits and states in relevant part:

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Reform Act of 1977, whichever is later. . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may be waived or tolled except upon a showing of extraordinary circumstances.

In *Tennessee Consolidation Coal Co.,* the Sixth Circuit held that a miner's subsequent claim is time-barred if it is not filed within three years of the date he received a medical determination of total disability due to pneumoconiosis. 264 F.3d 602, 608. The court stated the following:

> The three year limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits.

Id. The court stated further that medically supported claims, even if deemed premature because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. *Id.*

However, in *Peabody Coal Co. v. Director, OWCP,* 48 Fed. Appx. 140, 2002 WL 31205502 (6th Cir. 2002) (unpub.), the Sixth Circuit held that a subsequent claim filed by a miner under §725.309 is not barred by the three-year statute of limitations at §725.308(a) because denial of the miner's first claim on grounds that he did not suffer from pneumoconiosis "necessarily renders any prior medical opinion to the contrary invalid [.]" *Id.* at 146. The Sixth Circuit adopted the Tenth Circuit's holding in *Wyoming Fuel Co. v. Director, OWCP,* 90 F. 3d 1502 (10th Cir. 1996) and concluded the following:

> We agree with the reasoning of the Tenth Circuit and likewise expressly hold that a mis-diagnosis does not equate to a 'medical determination' under the statute. That is, if a miner's claim is ultimately rejected on the basis that he does not have the disease, this

finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitations purposes.

Id. Based upon this holding, the statute of limitations is renewed if the prior denial of benefits was premised on the finding that claimant failed to prove the existence of the disease.

Employer stated that Claimant testified that when he filed his prior claim in 1993 that Dr. William F. Clarke indicated that he was totally and permanently disabled due to coal workers' pneumoconiosis, and thus the statute of limitations began to run in 1993 when the medical determination of total disability was communicated to the Claimant.[11] *Employer's Brief* at 12. As a consequence Employer maintains that the current application for benefits is not timely filed pursuant to §725.308(a) because it was filed in 2001 well in excess of the three year statute of limitations. *Id.*

Employer's argument is flawed because the holding in *Peabody Coal Co.* renewed the statute of limitations when the miner's claim was denied in 1996 on the basis that he did not have the disease. In this case, Claimant originally filed for benefits on June 16, 1994. (DX 1) On January 30, 1996 Administrative Law Judge Donald Mosser denied benefits because Claimant failed to establish the existence of pneumoconiosis and total disability. *Id.* The decision was later affirmed by the Benefit Review Board on September 27, 1996. *Id.* Therefore, the 1993 diagnosis of pneumoconiosis and total disability communicated to Claimant by Dr. Clarke is rendered invalid based upon the Judge Mosser's decision denying benefits and the Board's affirming decision. Thus, the Claimant was "handed a clean slate for statute of limitations purposes."

Employer's argument that Claimant's application for benefits is barred by the statute of limitations fails, because Judge Mosser's decision and the Board decision were not consistent with such finding. Therefore, I find that Employer has failed to sustain its burden in proving that this claim is untimely.

Evidentiary Limitations

My consideration of the medical evidence is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. *Dempsey v. Sewell Coal Co.,* 21 BLR --, BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3)*, citing* 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator

[11] During the hearing, Claimant gave conflicting testimony. He testified that he recalled Dr. Clark's report in 1993 indicating that he was totally and permanently disabled due to coal workers' pneumoconiosis. (Tr. 23). Dr. Clarke's September 14, 1993 form report, appearing at DX 1, states: "It is my opinion that this individual's inability to perform coal mining and/or comparable employment is based on his coal workers pneumoconiosis and associated ventilatory impairment and is 100% permanently and totally disabled. I cannot find any other significant etiology for his disability." However, the Claimant also testified that he doesn't recall what he talked about with Dr. Clarke or the report. *Id.* at 24. Thereafter, Claimant testified that he recalled a doctor telling him that he had pneumoconiosis and was totally disabled. *Id.* Thus, the issue of whether the medical determination was communicated to Claimant is somewhat unclear; however, the issue is moot based upon my holding.

may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." *Id., citing* 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." *Id., citing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." *Id., citing* 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." *Id., citing* 20 C.F.R. §725.456(b)(1). The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.,* 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

Some of the medical evidence submitted in connection with the instant claim is not in compliance with the evidentiary limitations. The medical evidence designated or submitted by Claimant is in compliance with the numerical evidentiary limitations set forth in regulations; that evidence includes one x-ray interpretation (of an x-ray dated February 24, 2001), two pulmonary function tests (dated February 24, 2001 and May 24, 2001), one blood gas study (dated February 24, 2001), one medical report (dated February 24, 2001), and treatment records.[12] However, Employer's submissions raised an evidentiary issue. Employer designated two x-ray interpretations (of x-rays dated May 30, 2003 and July 2, 2001), two rebuttal x-ray interpretations (of x-rays dated February 24, 2001 and June 13, 2001), two pulmonary function studies (dated May 30, 2003 and July 2, 2001), two blood gas studies (dated May 30, 2003 and July 2, 2001), two rebuttals of blood gases (dated March 14, 2003), two rebuttals of pulmonary function studies (dated March 14, 2003), two medical reports (dated June 3, 2003 and July 2, 2001), two depositions by the same doctors, and hospital treatment records[13] on its evidence summary form.

The evidence designated by the Employer is in compliance with the exception of the rebuttal evidence submitted in connection with the blood gas studies and pulmonary function test. As previously stated in my May 31, 2005 Show Cause Order, the rebuttal evidence designated is not an individual assessment of the pulmonary function tests and arterial blood gas studies but rather a comprehensive medical report submitted by Dr. Vuskovich on March 14, 2003, and such medical report is inadmissible inasmuch as Employer has already designated and submitted two reports into evidence. Thus, Dr. Vuskovich's report will not be considered in totality, and I will only consider the sections of the report which evaluate the blood gas studies

[12] Treatment records are not subject to evidentiary limitations. §725.414 (a)(4).
[13] *See* note 12.

and pulmonary function tests specifically, and the remainder of the report is **STRICKEN**. **SO ORDERED.**

Additionally, the May 31, 2005 Order also addressed the x-ray evidence that was in excess of the evidentiary limits. The two x-rays (DX 13 and DX 17) admitted into evidence as Director's Exhibits exceed the evidentiary limitations. Neither party designated these two x-rays as their evidence at the hearing, but it was considered at the District Director's level. The Director submitted an Evidence Summary Form and designated DX 11 as the DOL chest x-ray study, pulmonary function test, arterial blood gas study, and medical report, which is allowed under the regulations. All other evidence in the Director's exhibits, in excess of the evidentiary limitations, unless exempt from the limitations, is not admissible. Thus, no good cause having been shown to include them in the record, the two x-ray interpretations (re-read of February 24, 2001 by Dr. Barrett [DX 14] and reading of March 24, 2001 x-ray by Dr. Hayes [DX 17]) are **STRICKEN** from the record. **SO ORDERED.**

I must also note that all admissible evidence from the 1994 prior claim is admitted into evidence as DX 1. Section 725.309(d)(1) provides that "any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim." Additionally, in *Church v. Kentland-Elkhorn Coal Corp.*, BRB Nos. 04-0617 BLA and 04-0617 BLA (Apr. 8, 2005)(unpub.), the Board stated that "as noted by the Director, when a living miner files a subsequent claim, all evidence from the first miner's claim is specifically made part of the record." Therefore, all evidence relating to the June 16, 1994 claim is admissible.

Subsequent Claims Analysis

The instant case is a subsequent claim, because it was filed more than one year after the first denial of benefits in 1994. *See* §725.309(d). Previously, such a claim would be denied based upon the prior denial unless the Claimant could establish a material change in conditions. *See* 20 C.F.R. §725.309(d). The Sixth Circuit Court of Appeals held that to find that a material change in condition has occurred, between earlier denial of claim under the Act and subsequent claim, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner employee has proven at least one of the elements of entitlement previously adjudicated against him. *Kentland Elkhorn Coal Corp. v. Hall*, 287 F. 3d 555, 559 (6th Cir. 2002); *citing Sharondale Corp. v. Ross,* 42 F.3d 993, 997-98 (6th Cir. 1994). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. *Id.* Then the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *Id.*

The amended regulations have replaced the material-change-in-conditions standard with the following standard:

> (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be considered a

> subsequent claim for benefits. **A subsequent claim** shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim **shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement** (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) **has changed since the date upon which the order denying the prior claim became final.**[14] The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, **the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based.** For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (3) **If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.** . .
>
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim. . . .[Emphasis added.]

20 C.F.R. § 725.309(d) (2003). Thus, it is necessary to look at the new evidence relating to each medical condition of entitlement to determine whether it establishes that condition of entitlement.

The prior claim was denied because the medical evidence failed to establish the existence of pneumoconiosis and total disability. *Collett v. Shamrock Coal Co*., 1995-BLA-1159 (ALJ, Jan. 30, 1996). (DX 1). Establishment of either of these elements would therefore reopen the claim for consideration of the merits. Thus, I must first determine whether the new evidence establishes either that the Claimant suffers from pneumoconiosis or that he is totally disabled within the meaning of the regulations.

[14] For a miner, the conditions of entitlement include whether the individual (1) is a miner as defined in the section; (2) has met the requirements for entitlement to benefits by establishing pneumoconiosis, its causal relationship to coal mine employment, total disability, and contribution by the pneumoconiosis to the total disability; and (3) has filed a claim for benefits in accordance with this part. 20 C.F.R. §725.202(d) *Conditions of entitlement: miner.*

Existence of Pneumoconiosis

To prevail in a claim for Black Lung benefits, a claimant miner must establish that he or she suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he or she is totally disabled, as defined in section 718.204; and that the total disability is due to pneumoconiosis. 20 C.F.R. §§718.202 to 718.204. The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Director, OWCP v. Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. *See Id.* Thus, in order to prevail in a black lung case, a claimant must establish each element by a preponderance of the evidence.

Under 20 C.F.R. §718.202(a)(1)-(4), a finding of pneumoconiosis can be made based upon x-ray evidence, biopsy or autopsy evidence, presumption, or the reasoned medical opinion of a physician based on objective medical evidence.

X-Ray Evidence. Claimant failed to establish pneumoconiosis by a preponderance of the x-ray evidence submitted in connection with this claim. The x-ray evidence is summarized above. Here, the record includes six interpretations of four chest x-rays that address the issue of whether the x-rays shows signs of pneumoconiosis; an additional interpretation only addressed the quality of the x-ray taken during the DOL examination. Of the six interpretations, two were positive for pneumoconiosis and the remainder were negative.

In determining the existence of pneumoconiosis based on chest x-ray evidence, "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays." 20 C.F.R. §718.202(a) (1). The Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified Radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984).

There are two conflicting interpretations in the record for each of the x-rays taken on February 24, 2001 and June 13, 2001. Dr. Baker found pneumoconiosis on the February 24, 2001 x-ray, and the other reader, Dr. Hayes, found to the contrary. Inasmuch as Dr. Hayes is dually qualified as a B-Reader and board-certified radiologist, his interpretation should be accorded greater weight than Dr. Baker, who was only an A-Reader at the time he interpreted the x-ray, even though he has qualified as a B-reader in the past. Additionally, the June 13, 2001 x-ray was interpreted as positive for the disease by Dr. Hussain while Dr. Hayes found the x-ray to be completely negative. Similarly, Dr. Hayes' interpretation is given greater weight based upon his B-reader and BCR qualifications over Dr. Hussain, who was only an A-Reader. Thus, I find that both the February 24, 2001 and June 13, 2001 x-rays do not support a finding of pneumoconiosis.

Two subsequent x-rays taken on June 2, 2001 and May 30, 2003 were interpreted as negative by B-readers Drs. Broudy and Dahhan, respectively. Thus, neither of these x-rays supports a finding of pneumoconiosis either.

Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. *Clark v. Karst-Robbins Coal Co*., 12 B.L.R. 1-149 (1989) (en banc); *Casella v. Kaiser Steel Corp*., 9 B.L.R. 1-131 (1986). In the case of x-ray evidence, more recent positive evidence may be credited over older negative evidence, but the Benefits Review Board has stated that "it is irrational to credit the most recent evidence strictly on the basis of its chronology, if that evidence is negative for pneumoconiosis." *Chaffin v. Peter Cave Coal Co.,* 22 BLR 1-294, 1-302 (BRB 2003). The x-ray taken on May 30, 2003 is two years after the first x-ray taken on February 24, 2001 by Dr. Baker. To the extent that any condition appearing on the earlier x-rays did not appear on later x-rays, it could not have been due to pneumoconiosis, in view of the progressive and irreversible nature of the disease. However, as it is also possible that the later x-ray was interpreted incorrectly, the "later evidence" rule will not be applied to give the x-ray of Dr. Dahhan taken on May of 2003 greater weight because it is the most recent x-ray study of record, based upon the Board's decision in *Chaffin.* Whether it is given additional weight or not would have no effect on the outcome of this claim.

In summary, there are two positive x-ray readings and four negative readings in the record, but the two x-rays read as positive were interpreted as negative by a more qualified reader. The physicians who made negative findings, Drs. Dahhan, Hayes and Broudy, are all B-readers, while both Drs. Hussain and Baker, who made the positive interpretations, hold the lesser radiological qualifications of an A-Reader. Thus, greater weight is given to the x-ray interpretations by B-reader physicians. Moreover, Dr. Hayes, who is the most qualified as a board certified radiologist and B-reader, found no pneumoconiosis in his x-ray readings of the February 24, 2001 and June 13, 2001 x-rays. In addition, the latest x-ray of record was interpreted as negative for the disease, although that fact is not controlling. Based upon the new x-ray evidence, Claimant failed to establish pneumoconiosis under §718.202(a)(1).

Autopsy or Biopsy Evidence. As there is no autopsy or biopsy evidence of record, Claimant has failed to establish the presence of the disease under 20 C.F.R. §718.202(a)(2).

Complicated Pneumoconiosis and Other Presumptions. A finding of opacities of a size that would qualify as "complicated pneumoconiosis" under 20 C.F.R. §718.304 results in an irrebuttable presumption of total disability. As there is no evidence of complicated pneumoconiosis, the section 718.304 presumption is inapplicable. The additional presumptions described in section 718.202(a)(3), which are set forth in 20 C.F.R. §718.305 and 20 C.F.R. §718.306 are also inapplicable, inter alia, because they do not apply to claims filed after January 1, 1982 or June 30, 1982, respectively. Further, section 718.306 does not apply, because the claim is not for death benefits. Thus, Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. §718.202(a)(3).

Medical Opinions on Pneumoconiosis. Moreover, I find that the medical opinion evidence does not, by a preponderance of the evidence, establish pneumoconiosis. The following four physicians provided medical opinions addressing the issue of whether Claimant has pneumoconiosis:

- Dr. Imtiaz Hussain, who conducted the Department of Labor examination on June 13, 2001;
- Dr. Glen R. Baker, who examined the Claimant at Claimant's request on February 24, 2001;
- Dr. Bruce C. Broudy, who examined the Claimant for Employer on July 2, 2001; and
- Dr. A. Dahhan, who examined the Claimant for Employer on May 30, 2003.

(1) Imtiaz Hussain, M.D., who is board certified in internal medicine with a subspecialty in pulmonary diseases, conducted an examination of Claimant on June 13, 2001, upon the Department of Labor's request. He completed a medical examination form, listing the patient history, detailed physical findings, testing results, cardiopulmonary diagnosis and its etiology, and degree of impairment. The chest x-ray results found pneumoconiosis; ventilatory study was normal; arterial blood gas study showed hypoxemia; and EKG showed an old inferior infarction. Dr. Hussain listed pneumoconiosis, COPD, and HTN [hypertension]. The causes for the diseases were listed as dust exposure and tobacco smoke. Dr. Hussain found mild impairment and opined that pneumoconiosis contributed 30% to the impairment and COPD contributed 70%.

In a supplemental form, Dr. Hussain indicated that his diagnosis of pneumoconiosis was based upon the x-ray findings. In addition, he categorized the Claimant's pulmonary impairment as mild, and he concluded that Claimant had the respiratory capacity to perform the work of a coal miner or perform comparable work in a dust-free environment. (DX 11).

(2) Glen R. Baker, Jr., M.D., who is board certified in internal and pulmonary medicine, examined the Claimant on February 24, 2001 at Claimant's request. Claimant's occupational, medical and smoking history was summarized in the report. The report stated that Claimant had 13 years of coal mine experience, and he smoked two to four packs of cigars for ten to fifteen years. The chest x-ray was positive for coal workers' pneumoconiosis ("CWP"); pulmonary function test was normal; and arterial blood gases showed moderate resting hypoxemia. He stated that Claimant has a Class I[15] impairment and a second impairment based upon the Guides to the Evaluation of Permanent Impairment; on the latter impairment, he stated that Claimant was 100% disabled, because a person who develops pneumoconiosis should limit further exposure to the offending agent. Thus, he opined that Claimant is 100% occupationally disabled from working in the coal mining industry or other similar dusty occupations. The diagnosis was CWP based upon abnormal x-ray and significant history of coal dust exposure. He also diagnosed Claimant with chronic bronchitis based on history. In regards to causation, he found that Claimant's disease was the result of coal dust exposure based upon x-ray findings. The pulmonary impairment was also the result of coal dust exposure, because he stated that any pulmonary impairment is caused at least in part by his coal dust exposure. (DX 12).

[15] This classification was based upon Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition.

(3) Bruce C. Broudy, M.D., who a B-reader and is board certified in internal medicine and the subspecialty of pulmonary disease, examined the Claimant on July 2, 2001 at Employer's request. The report summarized the Claimant's education, smoking history, occupational history, medical history, and present physical condition. Claimant stated that he smoked five cigars a day for ten years and that he had 13 years of coal mining experience. The spirometry was normal except a slight reduction in the MVV value; arterial blood gas study showed slight resting arterial hypoxemia; chest x-ray revealed no evidence of CWP. He diagnosed Claimant with hypertension; diabetes mellitus; obesity; back, knee and foot pain; and chronic bronchitis by history.

Dr. Broudy concluded that Claimant does not have CWP despite a adequate history of coal dust exposure, because the x-ray showed no small rounded or irregular opacities suggestive of CWP, silicosis or any other occupational pulmonary disease. The chronic bronchitis was due to smoking, and he found no significant pulmonary impairment based upon the spirometric and arterial blood gas studies. Based upon such evidence, he concluded that Claimant retained the respiratory capacity to perform his last coal mine employment. Moreover, after reviewing the medical records from the prior claim, he concluded that Claimant's condition had no substantial change since the prior ruling. (EX 6).

Broudy Deposition: Dr. Broudy had his deposition taken on March 20, 2003. He testified that he examined Claimant on May 22, 1995 [in relation to the prior claim] and on July 2, 2001 [in connection with the instant claim.] (EX 6 at 6-7). During the July 2, 2001 examination Claimant showed a normal pulmonary system with the only abnormalities including a limp favoring his back, some obesity, and elevated blood pressure. He stated that no rales, rhonchi, or wheezing were detected during the chest examination, which are indicators of CWP. *Id.* at 8-9. He also stated that the spirometry was normal, and the blood gases showed slight resting hypoxemia. *Id.* at 9. He testified that the slight reduction in MVV value was related to less than maximal effort by Claimant, because the normal MVV is 40 times the FEV1 and Claimant's was only 30 times the FEV1. *Id.* at 10. He stated that the spirometry and arterial blood gas testing was above the federal disability standards, and he speculated that the resting hypoxemia was caused by chronic bronchitis and obesity. *Id.* at 10-11. He stated that the chest x-ray was negative for evidence of pneumoconiosis. *Id.* at 12. Thereafter, he re-stated his diagnosis and conclusions from the report. *Id.* at 12-13. On cross-examination, Dr. Broudy testified that Claimant had sufficient work history for the development of pneumoconiosis but he found no chest x-ray evidence of the disease. *Id.* at 14. He testified that the scattered calcified granulomas seen on the chest x-ray were scars that could be related to healed histoplasmosis or previous tuberculosis infection. *Id.* He stated that the scarring found on the chest x-ray was not related to coal dust exposure but did not elaborate further. *Id.* at 14-15.

(4) A. Dahhan, M.D., who is a B-Reader and board certified in pulmonary and internal medicine, examined the Claimant on May 30, 2003 at Employer's request. Claimant's occupational and smoking history was listed, which stated he had 14 years of coal mine experience and was a nonsmoker. The EKG showed probable old inferior wall myocardial infarction; arterial blood gases showed a PO2 of 66.5 (rest)/72.8 (exercise) and PCO2 of 45.5 (rest)/42.8 (exercise), which he interpreted as demonstrating adequate blood gas exchange mechanisms at rest and after exercise; spirometry showed normal measurements; chest x-ray

showed cardiac enlargement but otherwise the lung fields were clear of pleural or parenchymal abnormalities consistent with pneumoconiosis. (EX 7).

In conclusion, he stated that based upon the occupational, clinical, radiological and physiological evaluation of Claimant, he has no evidence of occupational pneumoconiosis or pulmonary disability secondary to coal dust exposure as demonstrated by the normal clinical examination of the chest, normal spirometry, adequate blood gas exchange mechanisms at rest and after exercise and negative x-ray reading for pneumoconiosis. In addition, he stated that Claimant retains the respiratory capacity to continue his previous coal mine work, and there is no evidence of a pulmonary impairment or disability related to coal dust exposure. He also stated that Claimant's blood exchange mechanism resulted from his obesity and his therapy with Oxycontin for his orthopedic problems. (EX 7).

Dahhan Deposition: In addition, Dr. Dahhan offered deposition testimony on May 3, 2004. (DX 12). He testified that he is a B-reader who specializes in internal medicine with board certifications in internal and pulmonary medicine. *Id.* at 4-5. He testified regarding his findings in the medical report, including the occupational history, smoking history, and physical examination, chest x-ray, spirometry, and blood gas studies. *Id.* at 6-8. He stated that Claimant's resting hypoxemia was caused by excessive use of narcotic (i.e. oxycontin). *Id.* at 8. He testified that Claimant does not have CWP, because the spirometry (i.e. the mechanics of breathing) was normal but he was unable to oxygenate his blood due to the narcotic effect. *Id.* at 9. He also concluded that he had the respiratory capacity to return to work based on the pulmonary function test, clinical exam, and x-ray. *Id.* He also stated that both medical and legal pneumoconiosis was not present based on the medical data. *Id.* at 9-10.

Evaluation of Opinions. The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 B.L.R. 2-323 (4th Cir. 1998); *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). A doctor's opinion that is both reasoned and documented, and is supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *See Fields v. Island Creek Coal Co.,* 10 B.L.R. 1-19 (1987). A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis, and a "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions. *Fields, supra.*

Dr. Hussain's report diagnosed Claimant with pneumoconiosis. However, while his report indicates a detailed history and physical findings, it only references x-ray findings to support the diagnosis. To the extent that Dr. Hussain's opinion is based upon his own interpretation of a single x-ray, I find that such basis lacks probative value because as set forth above a more qualified physician (B-reader and board certified radiologist Dr. Hayes) interpreted the same x-ray as negative for pneumoconiosis. Therefore, the finding is discredited to the extent that a more qualified physician found to the contrary. Moreover, he failed to explain what characteristics of the x-ray findings supported the diagnosis of pneumoconiosis. It is unclear from his reports whether it is his opinion that COPD as well as CWP was caused by coal mine dust as well as cigarette smoking. Overall, Dr. Hussain's report lacks analysis to support his opinion and was conclusory.

Similarly, Dr. Baker's diagnosis of CWP was based upon his interpretation of the x-ray findings and a history of coal dust exposure and his report cannot be interpreted as finding legal pneumoconiosis as well as clinical pneumoconiosis. Dr. Baker's opinion is likewise given less weight because he holds lesser qualifications in radiology than the reader who found no pneumoconiosis. In this regard, Dr. Baker's interpretation of the February 24, 2004 x-ray lacks probative value because the same x-ray was interpreted as negative by a more qualified reader (B-reader and board certified radiologist Dr. Hayes). Additionally, I found that the preponderance of the radiological evidence does not support a finding of pneumoconiosis. Thus, the report is given less weight.

Claimant has argued that Dr. Baker's opinion should be given heightened weight as a treating physician. Under §718.104(d), in weighing the medical evidence, consideration should be given to the nature, duration, frequency, and extent of a physician's relationship with the miner as his treating physician. Here, Claimant testified that Dr. Baker was his treating physician for his breathing condition and had treated him prior to the time that he filed his February 2001 claim. (Tr. 14-15; 35). Although Dr. Baker examined the Claimant in connection with his previous claim, he was not Claimant's treating physician at that time. (DX 1). In addition, progress notes from Dr. Baker's treatment are in the record. (DX 16). Based upon the treatment records, Claimant was treated by Dr. Baker for a period of five months from May 2001 until October 2001. *Id.* While the treating relationship continued and involved treatment every three months, according to Claimant's testimony, Dr. Baker's examination report containing his opinion was prepared in February 2001. (DX 12). I find that the treating relationship lasted for a very limited period prior to issuance of Dr. Baker's opinion, and such abbreviated treatment does not warrant his opinion being given controlling weight. Moreover, Dr. Baker's status as treating physician does not negate the fact he does not hold radiological qualifications as a B-reader or board certified radiologist. Thus, his report is discredited to the extent that his findings rest on his interpretation of the chest x-ray evidence and he has not articulated another basis for his opinion, notwithstanding his status as treating physician.

The medical report of Dr. Broudy included a detailed discussion and analysis of the Miner's medical findings and he cogently stated the basis for his conclusions. In finding no CWP, he stated that no small rounded or irregular opacities consistent with the disease were found. The analysis specifically stated which factors from the x-ray findings were inconsistent with the characteristics of pneumoconiosis. Dr. Broudy also stated the basis for his opinions further at his deposition. His deposition testimony stated that the scarring found on the chest x-ray was possibly related to histoplasmosis or a previous tuberculosis infection. Dr. Broudy also briefly addressed the significance of the other examination findings. Overall, the deposition testimony enhanced the findings in the report. The report was detailed and well-reasoned and thus is given greater weight.

Dr. Dahhan, a B-reader, also submitted a well reasoned and documented medical report, and his determination that the Claimant does not have pneumoconiosis is supported by objective medical evidence. In addition, he provided deposition testimony, which for the most part restated his findings from the report. In the report, he based his conclusion on the occupational, clinical, radiological and physiological evaluations of the patient. The report outlined the

various examination findings, such as Dr. Dahhan's interpretation of Claimant's chest x-ray, the adequate arterial blood gas levels, and normal spirometry measurements, to support his conclusion that Claimant did not have occupational pneumoconiosis or any disability due to coal mine dust exposure.

The reports of Drs. Dahhan and Broudy are given more weight based upon the thorough analysis employed and documentation. Dr. Hussain's report lacked in the area of analysis and was entitled to less weight because his x-ray interpretation was discredited by a more qualified reader. Likewise, Dr. Baker's report was also given less weight based his reliance upon an x-ray interpretation that was later discredited by a more qualified reader. Neither physician explained a basis for their diagnoses apart from their own x-ray interpretations. However, both Drs. Dahhan and Broudy's conclusions that Claimant did not suffer from pneumoconiosis were well-reasoned and based upon objective medical evaluations. Moreover, the deposition testimonies enhanced the findings in their reports. I find that the opinions of Drs. Broudy and Dahhan outweigh the opinions of the other two physicians, and thus Claimant failed to establish the presence of pneumoconiosis by the preponderance of the new medical opinion evidence.

Other Evidence of Pneumoconiosis. There is additional new medical evidence consisting of hospital and treatment records.[16] All of this additional evidence was thoroughly considered. Below, I highlighted the records relevant to the issue of pneumoconiosis.

- **Dr. Baker's Treatment Records**: Progress notes[17] were provided. The progress notes dated July 9, 2001 and September 27, 2001 had the boxes for "CWP/COPD/CB[chronic bronchitis]/Pulm[onary] fibrosis" marked on the form. However, no explanation for the diagnosis was stated. (DX 16).

- **Chest/PA/Lateral report:** Baptist Regional Medical Center on September 22, 1998 stated:

  A mild degree of chronic inflammatory changes are noted in the lung fields with scattered small calcific nodules in both lung fields. The report concluded that it was a normal chest reading. (DX 15).

The new medical records provide little guidance on the issue of pneumoconiosis. The progress notes dated July 9, 2001 and September 27, 2001 by Dr. Baker were not helpful, because the diagnoses were stated without any explanation or data in support thereof. The chest report from Baptist Regional did not discuss pneumoconiosis, but it did state that the chest reading was normal. I find that the evidence of record is sufficiently detailed to provide an accurate picture of the Miner's medical condition. Overall, I do not find that any of the additional medical evidence in this case supports a finding of pneumoconiosis.

[16] Pulmonary function test were included in the hospital records. (DX 16) However, these test results, while relevant on the issue of total disability, are not probative on the issue of whether the Miner had coal workers' pneumoconiosis absent a physician's opinion interpreting their significance.
[17] The records were dated 5/24/01 to 10/2/01.

All Evidence on Pneumoconiosis. In considering all of the evidence submitted in connection with the instant claim, favorable and unfavorable, I find that the new evidence fails to establish the presence of pneumoconiosis under any of the individual subsections of section 718.202(a) or under the section as a whole. Taking into consideration all of the evidence on the issue of the existence of pneumoconiosis, I find that the Claimant cannot establish pneumoconiosis as defined by the regulations under the newly submitted evidence. Accordingly, this claim cannot be reopened based upon a finding of pneumoconiosis.

Evidence from Prior Claim. Even if this claim were reopened, the Claimant would be unable to establish pneumoconiosis based upon all of the evidence of record. In this regard, the medical evidence previously of record also fails to establish the existence of pneumoconiosis.

The preponderance of the x-ray evidence from the previous claim was negative for pneumoconiosis. In considering the x-ray evidence, there were a total of twenty-two x-ray interpretations in the prior record with nineteen negative readings and only three positive readings. Two of the positive readings were by B-reader physicians (Drs. Baker and Anderson), and the other physician (Dr. Clarke) was a A-reader. The same three x-ray films (dated May 5, 1993; September 14, 1993; and October 19, 1993) were subsequently reread, inter alia, by two dually qualified radiologist and B-reader physicians (Drs. Spitz and Halbert) as negative. Thus, greater weight is given to Dr. Spitz' and Dr. Halbert's interpretations due to their superior credentials. In addition, two more recent x-ray of record (dated July 21, 1994 and May 22, 1995) were interpreted as negative. Therefore, as Judge Mosser found, Claimant failed to prove pneumoconiosis through the x-ray evidence under §718.202(a)(1).

There was no biopsy or autopsy evidence and no evidence of complicated pneumoconiosis, and thus sections 718.202(a)(2) and (3) were not satisfied.

Regarding medical reports, as Judge Mosser noted, it is unclear whether Drs. Baker, Clarke and Anderson's findings of pneumoconiosis were based solely upon their positive x-ray readings. However, to the extent that they have done so, their abnormal x-ray findings are discredited to the extent that a more qualified physician interpreted the same x-ray as negative. Moreover, their diagnoses are not supported by other objective medical evidence. Additionally, the reports of Drs. Myers, Vaezy and Broudy finding the absence of pneumoconiosis were more comprehensive and supported by objective testing. Thus, I find, as did Judge Mosser, that pneumoconiosis was not established under §718.204(a)(4).

In view of the above, even if this claim were reopened and considered on the merits, it would fail because the Claimant cannot establish pneumoconiosis.

Total Disability

The regulations as amended provide that a claimant can establish total disability by showing pneumoconiosis prevented the miner "[f]rom performing his or her usual coal mine work," and "[f]rom engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of

time." 20 C.F.R. §718.204(b)(1). Where, as here, there is no evidence of complicated pneumoconiosis, total disability may be established by pulmonary function tests, arterial blood gas tests, evidence of cor pulmonale with right sided congestive heart failure, or physicians' reasoned medical opinions, based on medically acceptable clinical and laboratory diagnostic techniques, to the effect that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in the miner's previous coal mine employment or comparable work. 20 C.F.R. §718.204(b)(2). For a living miner's claim, it may not be established solely by the miner's testimony or statements. 20 C.F.R. §718.204(d)(5).

According to his testimony and written submissions, Claimant's only coal mine employment was with Shamrock Coal Company. He was an equipment operator for a longer period during his employment. (Tr. 11) As an equipment operator, he operated the scoop and shuttle car. The scoop hauled supplies into the mines, cleaned the face up, cleaned roadways, pulled man trips, and hauled workers in and out of the mines. *Id.* The heaviest weight he was required to lift was one hundred pounds. *Id.* Claimant's job description must be considered in light of the medical evidence. Based upon the newly submitted evidence, Claimant has not established total disability under §718.204(b).

Pulmonary Function Tests As summarized above, none of the new pulmonary function tests produced qualifying values (DX 12, DX 11, EX 6, EX 7, and DX 16). *See* 20 C.F.R. §718.204(b)(2)(i). It is true that a low MVV value was produced during one of the tests, but an MVV value alone is insufficient to produce qualifying PFTs . Moreover, Dr. Vuskovich stated that Claimant's abnormally low MVV value during the February 24, 2001 test would indicate a false positive finding for any pulmonary impairment. (DX 36). Accordingly, I find that the pulmonary function tests do not support a finding of total disability under §718.204(b)(2)(i).

Arterial blood gases. In addition, Claimant also failed to establish total disability through arterial blood gas studies under §718.204(b)(2)(ii). Although showing some impairment in oxygen transfer, none of the arterial blood gases produced qualifying values.

Cor pulmonale with right-sided congestive heart failure. There is no evidence of cor pulmonale or congestive heart failure, so Claimant has not established total disability under section 718.204(b)(2)(iii).

Medical opinion evidence on total disability. I also find that Claimant has not established total disability through reasoned medical reports. As summarized above, Drs. Baker, Hussain, Broudy, and Dahhan all submitted opinions on the issue of total disability. Drs. Hussain, Broudy, and Dahhan determined that the Claimant was not disabled from a respiratory standpoint from performing his work as a coal miner while Dr. Baker found otherwise.

Dr. Baker was the only physician who purportedly found total disability; however, his findings were not supported by qualifying pulmonary function tests or arterial blood gases but rather the standard that Claimant should not be exposed to the environment that allegedly caused pneumoconiosis. In this regard, Dr. Baker stated that Claimant had a Class I impairment and that he was also 100% occupationally disabled from working in the coal mining industry or other similar dusty occupations based upon his diagnosis of pneumoconiosis because he should not be

exposed to dust. His conclusion is not consistent with the federal regulations. Dr. Baker did not compare the requirements of Claimant's coal mine employment with his capabilities nor did he state that a Class I impairment would prevent the Claimant from performing his last coal mine employment or comparable work. Moreover, a finding that a miner should avoid occupational exposure is more in the nature of a medical recommendation based upon health concerns and is insufficient to establish total disability from a pulmonary or respiratory condition. *See Taylor v. Evans and Gambrel Company, Inc.*, 12 BLR 1-83 (1988) (advice that a miner should avoid dusty situations is not tantamount to a finding of total disability due to pneumoconiosis). *See also Zimmerman v. Director, OWCP,* 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989) (recommendation that miner not return to underground coal mining because of his silicosis is not equivalent to a finding of total disability). *But see White v. New White Coal Col, Inc.,* 23 B.L.R. 1-1 (2004) (affirming ALJ's finding that similar opinion by Dr. Baker is supportive of claimant's burden of establishing a totally disabling respiratory impairment). Even if Dr. Baker's opinion is deemed to be a determination of total respiratory disability, I find the lack of objective clinical findings to support Dr. Baker's determination discredits his opinion, which is neither reasoned nor documented. Further, I decline to give Dr. Baker's opinion controlling weight as a treating physician due to the limited period of time that he treated Claimant before rendering his opinion, as discussed above. Additionally, the reports of Drs. Dahhan and Broudy are given more weight based upon the thorough analysis employed and supporting documentation. Claimant has therefore failed to satisfy the burden of proving total disability through medical opinion evidence under section 718.204(b)(2)(iv).

Section 718.204(b)(2) as a whole. Looking at §718.204(b)(2) as a whole, based solely upon the newly submitted evidence, Claimant failed to establish total disability based upon the pulmonary function tests, arterial blood gases, and medical reports. Thus, I find that total disability has not been established by the newly submitted evidence under section 718.204(b)(2).

All Evidence on Total Disability. In considering all of the evidence, favorable and unfavorable, the evidence fails to establish total disability under any of the individual subsections of section 718.204(b)(2) or under the section as a whole. Claimant has failed to establish that he is unable to perform his usual coal mine employment as an equipment operator based upon a pulmonary or respiratory disability under the new evidence. Thus, there is no basis for reopening this claim based upon a finding of total disability. The same result is reached if the evidence previously of record is considered. Taking into consideration all of the evidence on the issue of total disability, I find that the Claimant cannot establish total disability as defined by section 718.204(b)(1).

CONCLUSION

Inasmuch as the Claimant cannot establish the presence of pneumoconiosis or total disability based upon the newly submitted evidence, the requirements of 20 C.F.R. §725.309 have not been satisfied and this claim cannot be reopened for adjudication of the merits. Furthermore, even if this claim were to be considered on the merits, it fails because these essential elements of a claim for black lung benefits cannot be established based upon the record as a whole. Thus, the claim must be denied and a separate discussion and analysis of the remaining issues raised in this claim is unnecessary.

ORDER

IT IS HEREBY ORDERED that the claim of Clifford Collett for black lung benefits be, and hereby is, **DENIED.**

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, DC

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of the Notice of Appeal must also be served on the Associate Solicitor for Black Lung Benefits at the Frances Perkins Building, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.